

Democracy at Work

National Labor Relations Board
Region 9

October 2013 Volume 4, Issue 2



First Full Board in Over a Year

by Joseph Tansino

For the first time in a decade, the Board has a full complement of confirmed Members. Following their confirmation by the Senate on July 30, 2013, Philip A. Miscimarra, Kent Y. Hirozawa, Harry I. Johnson, III, and Nancy J. Schiffer joined Chairman Mark Gaston Pearce to form a full Board. The Board has not had five Members, including those serving under recess appointments, since July 23, 2012.

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Members Miscimarra, Schiffer, Chairman Pearce,
Johnson & Hirozawa.

RECENT BOARD DECISIONS

by Liz Macaroni

The Board issued several decisions of interest this year. In representation cases the Board found a bargaining unit limited to pipefitters appropriate while in unfair labor practice cases the Board dealt with a nationwide rescission of rules, an email usage case, overturned a 1984 case on solicitation of worker grievances, and examined inability to pay vs. competitive disadvantage claims.

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QUESTIONS?

- General Info:
513-684-3686
- Newsletter:
David Morgan
513-684-3643
- Outreach:
Laura Atkinson
513-684-3625

First Full Board in Over a Year

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Chairman Pearce, was first confirmed by the Senate in June 2010, after serving under President Obama's recess appointment in April 2010. His first term ended on August 27, 2013, and he was reconfirmed along with his colleagues. Like Members Hirozawa and Schiffer, Pearce began his legal career in an NLRB Regional Office. After receiving his law degree from the State University of New York at Buffalo, Pearce worked for NLRB Region 3 in Buffalo from 1979 to 1994. Before joining the NLRB in Headquarters, he was appointed as a Board Member for the New York State Industrial Board of Appeals and also practiced law privately as a founding member of Creighton, Pearce, Johnsen & Giroux. His current term will expire on August 27, 2018.



A graduate of the University of Michigan Law School, **Member Schiffer** served as a staff attorney in NLRB Region 7 (Detroit) before going into private practice. From 2000 to 2012, she served as Associate General Counsel for the AFL-CIO. Prior to that, she was Deputy General Counsel for the United Auto Workers from 1998 to 2000, and Associate General Counsel for the UAW from 1982 to 1998. Member Schiffer was sworn in on August 2 and will serve a term that expires on December 16, 2014.

Member Hirozawa began his career as a pro se law clerk for the U.S. Court of Appeals for the Second Circuit from 1982 to 1984 and worked as a field attorney in Region 2 (Manhattan) from 1984 to 1986. He received his J.D. from New York University School of Law. Most recently, Hirozawa served as Chairman Pearce's Chief Counsel during his first term. Prior to becoming the Chairman's chief legal advisor in 2010, Member Hirozawa was a partner in the New York law firm Gladstein, Reif and Meginniss, LLP. His term will expire on August 27, 2016.



Member Miscimarra received his M.B.A. and J.D. from the University of Pennsylvania's Wharton School of Business and Law School, respectively. He worked at the law firm of Seyfarth Shaw from 1987 to 2005, first as an associate and, from 1990, as a partner. Member Miscimarra had been partner at Morgan Lewis & Bockius since 2005 and also served as a senior fellow at the Wharton School. He was sworn in on August 7 for a term that expires on December 16, 2017.

Before his appointment to the Board, **Member Johnson** was a partner at Arent Fox LLP in Los Angeles. From 2006 to 2010, Member Johnson was a partner at Jones Day. He received his M.A.L.D. from Tuft University's Fletcher School of Law and Diplomacy and his J.D. from Harvard University Law School. Member Johnson was sworn in on August 12, and his term expires on August 27, 2015.



BOARD AUTHORIZED 10(j) INJUNCTIONS

by David Morgan

The Region received authorization from the Board to seek injunctive relief in two cases. *Advanced Metal Technologies of Indiana, Inc.*, Cases 9-CA-083508, et al. originated with a series of charges filed against Advanced Metals beginning in June 2012. On November 19, 2012, the Board authorized that Section 10(j) proceedings be initiated. The Region filed the 10(j) petition on November 30, 2012. On January 7, 2013, the administrative hearing commenced before Administrative Law Judge David Goldman. While the administrative



proceedings were ongoing, the District Court, on January 28, 2012, conducted a hearing on the Region's 10(j) Petition. On February 15, 2013, U.S. District Court Judge Tanya Walton Pratt for the Southern District of Indiana granted, in part, the Region's petition for injunctive relief in *Muffley v. Advanced Metals Technologies of Indiana, Inc.*, Case No. 4:12-cv-00148-TWP-WGH. The Preliminary Injunction enjoined and prohibited Advance Metals from restraining and coercing employees in the exercise of their Section 7 rights, acting unilaterally to change terms and conditions of employment, and failing and refusing to bargain in good faith with the union. Judge Pratt also concluded that the evidence was insufficient to show a "likelihood of success" as to the refusal to hire two employees, found that rescission of the changes was unnecessary as the parties had belatedly bargained over them, and found that a Board order would not be inadequate to remedy the alleged refusal to provide information.

The second authorization for injunctive relief was granted in *World Class Corrugated*, Case 9-CA-102875, a charge that was filed on April 15, 2013. This case involves another successor employer that allegedly attempted to avoid its obligations to recognize and bargain with the incumbent union. On July 10, 2013, the Region issued a complaint against World Class Corrugated alleging that it implemented a plan to hire employees designed to exclude and/or limit the hiring of the former employees and, therefore, that it was

obligated to recognize and bargain with the incumbent union. In addition, World Class Corrugated, without affording the union an opportunity to bargain, unilaterally implemented several changes in employees' terms and conditions of employment. On August 21, 2013, a Board majority authorized the institution of 10(j) proceedings. The trial before the Administrative Law Judge is scheduled to commence on October 21, 2013.



RECENT BOARD DECISIONS

Continued from Cover

- In *Fraser Engineering Co.*, 359 NLRB No. 80 (March 20, 2013), the Board applied *Specialty Healthcare & Rehab Ctr.*, 357 NLRB No. 83 (2011) in concluding that a bargaining unit limited to pipefitters was appropriate. The Board found that the employer did not meet its burden of showing that its wholly-owned subsidiary's employees share such an overwhelming community of interest with the petitioned-for employees that there was no legitimate basis on which to exclude them.

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- On April 26, 2013, the Board issued *Target Corp.*, 359 NLRB No. 103, affirming the administrative law judge's (ALJ) finding that the employer violated Section 8(a)(1) of the Act by maintaining and, in some instances enforcing, unlawful confidential information, no-solicitation/no-distribution, and off-duty access and dress code policies. The Board also adopted the ALJ's findings that the employer had engaged in campaign conduct that was in violation of Section 8(a)(1), including a threat to close the store, impression of surveillance, improper interrogation, threats of discipline, and unspecified reprisals. In light of the relevant violations, the Board concurred with the judge's decision to overturn the election results and to direct a new election. Further, the Board ordered, among other remedies,

that the employer revise the unlawful policies as they apply to all stores nationwide and post Board Notices at all of the stores.

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- In *Weyerhaeuser Co.*, 359 NLRB No. 138 (June 20, 2013), the Board adopted the administrative law judge's (ALJ) conclusion that a manufacturer of pulp and paper did not violate the Act by maintaining its electronic media use policy, which restricted employee use of its electronic media to “business purposes only.” The Board also adopted the ALJ's conclusion that the employer violated the Act by maintaining its Company informational notice, which prohibited employee union representatives from using the employer's email system to send “protracted dissertations.” The Board found that the Company informational notice was facially discriminatory since it limited only email messages related to union business and therefore unlawful, as was the discipline of an employee pursuant to that notice.”

related to union business and therefore unlawful, as was the discipline of an employee pursuant to that notice.

- In *Albertson's LLC*, 359 NLRB No. 147 (July 2, 2013), the Board found that the employer violated Section 8 (a)(1) of the Act during the union's organizing campaign by soliciting grievances from an employee and impliedly promising to remedy her grievances, surveilling employees' organizing activities, threatening an employee with discharge, and creating the impression that her organizing activities were under surveillance. With respect to the solicitation of grievances, the Board held that

“With respect to the solicitation of grievances, the Board held that to the extent *William T. Burnett & Co.* holds that the solicitation of grievances cannot be found unlawful if the solicited employee fails to raise a grievance, it is contrary to Board precedent and overruled on that point.”

to the extent *William T. Burnett & Co.*, 273 NLRB 1084 (1984), which the employer relied on, holds that the solicitation of grievances cannot be found unlawful if the solicited employee fails to raise a grievance, it is contrary to Board precedent and overruled on that point. Reversing the judge, the Board also found that the respondent's attorney, in preparing for the hearing, violated Section 8(a)(1) by interviewing an employee without providing him assurances against reprisals as required by the decision in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), and that the employer's store manager separately violated 8 (a)(1) by requiring the employee to attend the interview against his will.

- Also in July, the Board re-examined information request standards involving employer claims of an “inability to pay” vs. “competitive disadvantage” in *Coupled Products LLC*, 359 NLRB No. 152 (July 10, 2013). In that case, the Board found that the employer did not violate Section 8(a)(1) and (5) by denying the union's request for financial information and an audit of the employer's books during negotiations to renew their collective-bargaining agreement. The Board found that the employer had consistently claimed to suffer from a competitive disadvantage because the amount of the concessions it sought mirrored the lower wages and benefits paid by other local companies. The union did not make specific requests based on these claims of competitive disadvantage, but instead insisted on obtaining all of the employer's financial information, to which it was not entitled. The Board also found that the employer's earlier threat to close the plant did not indicate impending insolvency (and thus, an inability to pay), in light of its profits in the two previous years and its willingness to operate the plant if it could break even.

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Region 9 Roundup

by David Morgan

Board Decisions & Administrative Law Judge Decisions

The Board issued decisions in five Region 9 cases this year. In addition, four favorable Administrative Law Judges' Decisions issued.

In *Mike-Sell's Potato Chip Co.*, 359 NLRB No. 86 (March 19, 2013), the Board found that the employer unlawfully implemented midterm modifications to the health and welfare terms of the collective-bargaining agreement without following the contractual reopening procedures. The Board directed the employer to restore the health and welfare terms and make whole all unit employees for all expenses incurred and all losses suffered as a result of the modifications. The employer has filed a petition for review in the D.C. Circuit.

In *Garda CL Great Lakes, Inc.*, 359 NLRB No. 148 (June 28, 2013), the Board set aside an election and directed a second election as a result of the employer soliciting employee grievances and promising to remedy them during the union's organizing campaign, and improving employee working conditions in order to discourage employees from organizing. The Board also ordered that a responsible official of the employer read the Board's

“eliminating the contractual retiree medical benefits for all employees”

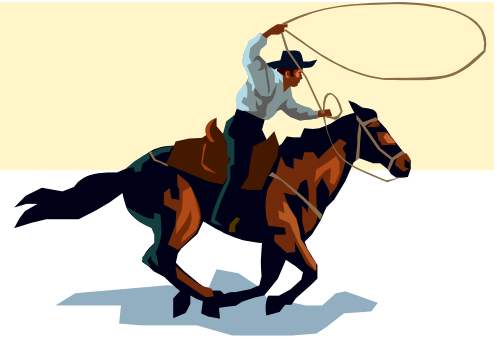
notice. The parties agreed to a second election, of the approximate 28 eligible voters, 15 ballots were cast against the union and the results were certified.

Three of the Board decisions were unpublished or not contested. On April 25, 2013, the Board adopted the

findings and conclusions of the Administrative Law Judge

in *Cincinnati Bell Telephone Company LLC*, JD-12-13 (March 13, 2013) that the employer improperly continued its investigatory interview of an employee after the employee, reasonably believing that the interview might result in discipline, invoked his *Weingarten* rights. This case was closed in compliance. On May 8, 2013, the Board adopted the Administrative Law Judge's decision in *Ohio Insulation and Manufacturing Company*, JD(SF)-21-13 (March 27, 2013). The ALJ concluded that Ohio Insulation violated Section 8(a)(1) and (3) of the Act by discharging an employee because of the employee's union and protected concerted activities. On September 20, 2013, a Compliance Specification issued regarding the amount of backpay owed to the employee and trial is scheduled to commence on December 3, 2013. In *Cobalt Coal Corp. Mining, Inc.*, 359 NLRB No. 123 (May 24, 2013), the Board granted default judgment on the grounds that the employer failed to file an answer to a consolidated compliant and compliance specification and the case has been referred to enforcement.

In *American Electric Power*, JD-49-13 (July 31, 2013), the Administrative Law Judge found that the Employer violated Section 8(a)(1) and (5) and 8(d) of the Act by eliminating the contractual retiree medical benefits for all employees hired after January 1, 2014 without the union's consent. The Judge recommended, among other things, that the employer restore the medical benefits and make whole any employee who loses benefits as a result of the employer's elimination. On September 13, 2013, the employer filed exceptions to the ALJ Decision.



In *ConAgra Foods, Inc.*, JD-34-13 (May 9, 2013), the Administrative Law Judge found that the Employer violated Section 8(a)(1) and (3) of the Act by issuing an employee a warning for encouraging other employees to sign an authorization card and posting a letter that prohibited employees from discussing the union while working. The ALJ recommended that the employer rescind the warning issued to the employee and revise and post the letter so as to inform employees that it does not consider discussing the union during work time to constitute solicitation within the meaning of its Solicitation Policy. On June 3, 2013, the employer filed exceptions to the ALJ Decision.

In *DHL Express (USA), Inc.*, JD-27-13 (April 22, 2013), an Administrative Law Judge found that the Employer, in violation of Section 8(a)(1) and (3) of the Act, prohibited the distribution of union literature in a nonwork area, threatened to escort employees from the facility unless they ceased such lawful distribution and discharged one employee for engaging in union or other protected concerted activities. The Judge recommended that the employer offer the employee full reinstatement to his former job, make the employee whole for all loss of earnings and other benefits, expunge references of the discharge from its files and cease prohibiting the distribution of literature in nonwork areas. On May 20, 2013, the employer filed exceptions to the ALJ Decision.

On September 11, 2013, an Administrative Law issued a decision in *Advanced Metal Technologies of Indiana, Inc.*, JD-61-13, finding that the employer violated Section 8(a)(1) and (5) of the Act by, among other things, coercively interrogating employees, bypassing the union and dealing directly with employees, implementing several unilateral changes, failing to provide the Union with requested information and, by its overall conduct, failing to bargain in good faith with the union. Although the Judge found that the refusal to hire allegations should be dismissed, he also concluded that since the employer's conduct deprived the union of a reason-

able period of lawfully-conducted bargaining the remedy should include an extension of the successor bar period as defined in *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011). Moreover, the ALJ agreed that, due to Advanced Metals' outrageous conduct, a notice reading and reimbursement to the union for the costs and expenses associated with bargaining were appropriate.

Regional Director Decisions

Jan-Care Ambulance of Raleigh County, Inc., Case 9-RC-097338, March 1, 2013. The employer operates an ambulance service throughout West Virginia with separate revenue generating corporations in various Counties, including Raleigh County. The union petitioned for a unit of emergency medical technicians, paramedics and drivers employed by the employer at or out of its Raleigh County facility and the employer asserted that the unit should include all employees in those classifications in the entire State.

“the drivers had a separate and distinct community of interest from the other employees”

The Regional Director found that the Raleigh County unit was appropriate, noting that there was not a strong community of interest between the employees on a statewide basis and that the employer organized its operations along county lines including different

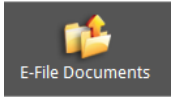
management at Raleigh County. Further proceedings were blocked pending investigation of an unfair labor practice charge filed by the union.

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Tech Tips: E-Filing

by Tamilyn Thompson

Participants are strongly encouraged to file all case documents through the Agency's e-filing portal. The portal can be accessed by clicking the



button on the Agency's homepage (www.nlr.gov).

Do not file case documents by email to the investigating Agent.

Case documents applicable to more than one case (related or consolidated cases) need only be filed in the "lead case", the case with the lowest case number.

Additional copies of E-Filed documents should not be mailed or faxed. One format is sufficient.

Exhibits should be filed as separate documents with the same Document Type as the main document. For example: Exhibit

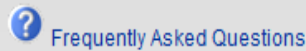
1 to a Position Statement should be filed as a Position Statement with the document name "Exhibit 1 – specific name to identify document"

Document names should be specific enough to identify what the document is. For example "Exhibit 1 – September 2013 Payroll Records" instead of "Exhibit 1 – payroll"

Documentary Evidence that is not an exhibit to another document should be filed as Evidence with specific identifying information.

Documents are timely filed if they are fully received by the Agency's E-Filing system before midnight on the date the document is due.

For help with technical problems



click in the top right corner of the E-File screen, or email e-filing@nlrb.gov. Assistance is

available during regular business hours.

No account or registration is required for filing, but participants may create a permanent profile for ease of future filing.

Mobile Apps

On August 30, 2013, the NLRB announced the launch of a new mobile app, available free of charge for iPhone and Android users. The app provides information for employers, employees and unions, with sections describing the rights enforced by the Board, along with contact information for regional offices across the country. The app also details the process used in elections held to determine whether employees wish to be collectively represented. The app is currently available for [iPhone users on the Apple App Store](#) and for [Android users on Google Play](#).

Region 9 Roundup

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The Pepsi-Cola Bottling Company of Winchester, Kentucky, a Division of G & J Pepsi-Cola Bottlers, Inc., Case 9-RC-110313, August 21, 2013. The Employer produces and distributes various canned beverages to customers from its facility in Winchester, Kentucky. The union petitioned for a unit of all drivers employed by the employer at this facility excluding, among others, merchandisers and warehouse employees. The employer maintained that the smallest appropriate unit must include the merchandisers. The Regional Director, relying on *Specialty Healthcare*, found that the drivers had a separate and distinct community of interest from the other employees and thus constitute an appropriate unit. On September 18, 2013, the Board denied the employer's Request for Review. That same day, an election was conducted. Of the approximately 34 eligible voters, 19 cast ballots for the union.

Region 9 Retirements & Promotions

by Carolyn Fath

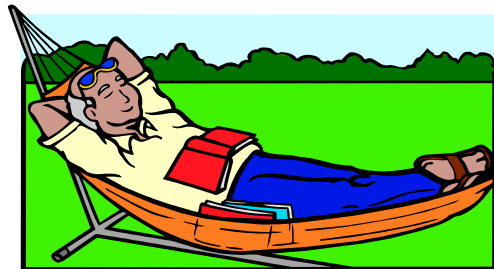
Every day is Saturday for our three retired comrades!

Barb Adams retired on June 28, 2013, after 38 years of service. While a field examiner, Barb relished the opportunity to meet the public, Union representatives and members of the bar alike. As a newer retiree, she plans to unwind with a good book at the pool and chill for a month or two. But Barb is not one to sit still for long and she intends to scout out opportunities to give back in the community this Fall and has even contemplated a walk on the wild side – volunteering at the Cincinnati Zoo that is! With her outgoing personality, Barb is sure to be a welcome addition to any activity she gets involved in.

Looking back over a varied career of tough trials and complex cases that would challenge a lesser person is certainly something to be proud of.

Deborah Jacobson, who was a Deputy Regional Attorney with the Region when she retired, can't stop smiling! After 33 years of service, Deborah retired on May 31, 2013. Her expertise will be sorely missed. She has indoctrinated many agents on the nuances of investigations, as well as new trial attorneys on the ways of the courtroom. Deborah plans to continue her travels with her faithful companions – hubby Jon and doggy Maggie. She also plans to spoil her father and the grandkids!

Compliance Officer **Jon Grove**, who is one of our favorite Hoosiers, decided to stop tracking down those hidden assets and discriminatees. On August 2, 2013, after 34 years of service, Jon retired. Always ready with a funny story and his calculator, Jon enjoyed working out the details that brought respondents into compliance and backpay to discriminatees. His tenacity and charm were responsible for many contentious cases settling at the compliance stage. After many years of travel, Jon intends to keep it up from the comfort of his camper. Jon is an avid scuba diver, kayaker, and grandpa to five boys.



Patricia Enzweiler has been selected to take over the reins as Compliance Officer. Patricia is a seasoned field examiner with 38 years of experience who brings a wealth of insight and understanding to her new position. As head of our full-service compliance department, Patricia is ready to help iron out those pesky issues that sometimes arise with respect to posting locations, backpay calculations and tax deductions, as well as respondents and discriminatees who are MIA. Please feel free to contact Ms. Enzweiler for all your one-stop compliance needs.

Eric Taylor has recently been promoted to Supervisory Attorney. With 26 years of litigation and investigation experience under his belt, marshalling his team members and their cases comes as second nature for him. Eric has also been named the Region's Freedom of Information officer or FOIA Czar. While mastering the intricacies of the Freedom of Information Act, Eric is adept at fulfilling all your non-exempt information needs. (For a small government-mandated fee, of course!) Please address all your information requests, which must be in writing, to Mr. Taylor for processing.

Eric Oliver, who sports 29 years of experience as an investigator and senior litigator, has been promoted to Supervisor Attorney. Eric's responsibilities include overseeing a team of investigators and attorneys, as well as the auspicious position of Injunction Coordinator. After the Regional Director has determined that injunctive relief is appropriate, Eric springs into action to shepherd the injunction paperwork from inception to filing. Eric ensures that all the prepared documents are thorough, complete, and based on the most current law. Not to mention filed expeditiously!

Contributors

David Morgan, SFX, Editor

Liz Macaroni, FX

Tamilyn Thompson, FX

Carolyn Fath, FX

Joseph Tansino, FA

Johanna Buchholz, FX

WE ARE AT YOUR SERVICE

For assistance in filing a charge or a petition, call the Regional Office at (513) 684-3632 and ask for the information officer. The information officer will discuss the situation and assist you in filling out a charge or petition. Information is available during office hours, Monday to Friday, 8:30 a.m. to 5:00 p.m., or at www.nlr.gov

ESTAMOS A SU SERVICIO

Para asistencia de someter una carga o petición
Llame la oficial de información en oficina regional a
(513) 684-3686.

La oficial de información discutirá su situación y le ayudará si desee
Someter una carga o petición. Información esta dispuesta a usted
mientras las horas de servicio - lunes a viernes, 8:30 a.m. to 5:00 p.m., o
www.nlr.gov

Comments or Questions?



In addition to the topics we may choose to feature, we would like to invite your comments and suggestions concerning specific items of interest, regional policies, practices, or procedures that you would like to see discussed, or whether you would prefer a Spanish version, an electronic format or to be deleted from our mailing list altogether. We can make it

happen and your comments would be greatly appreciated. Please contact Supervisory Field Examiner David Morgan at david.morgan@nlrb.gov or by phone at 513-684-3643.

SPEAKERS AVAILABLE!

Need a speaker for a training conference or class instruction? The Agency actively promotes increased knowledge and understanding of the National Labor Relations Act through the vigorous promotion of its Outreach Program. The Outreach Program offers experienced Board Agents to employers, labor organizations and learning institutions for presentations and training regarding the Board's mission, organization, structure and function. Presentations have included mock representation elections, exposure to the Board's hearing processes and instruction tailored fit to a party's particular issue/need. Recent Outreach Educational Program engagements included programs designed for the International Brotherhood of Electrical Workers, the American Federation of Federal, State, County and Municipal Employees, the University of Kentucky School of Law, and Northern Kentucky University. If you have an interest in the Outreach Program, please contact Assistant Regional Director Laura E. Atkinson at (513) 684-3625 or laura.atkinson@nlrb.gov.

